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Supreme Court, U.S.
FILED
07-133 APR 18 2007
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

SALVADOR SANCHEZ SALAS
Petitioner
v.

ALBERTO GONZALES ATTORNEY GENERAL
Respondent

On Petition or a Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

USCA No. 06-73168
Agency No. A95—451-359

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QUESTIONS PRESENTED

A. DID THE NINTH CIRCUIT COURT OF APPEAL ERR IN DENYING PETITIONER'S MOTION FOR REVIEW AND REHEARING?

LIST OF PARTIES

The party in this case is the United States Immigration and Naturalization Service.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

{X} For cases from Federal Courts

The opinion of the United States Court of Appeal appears at Appendix A to the petition and is

{X} is unpublished.

JURISDICTION

{X} For cases from Federal Court

{X} A timely petition for rehearing was denied by the United States Court of Appeal on the following date; January 26,2007 and a copy of the order denying a rehearing appears at Appendix A.

The jurisdiction of this court is invoked under 28 U.S. C. Section 1254 (1)

CONSTITUTIONAL AND STATUATORY PROVISIONS INVOLVED

Immigration and Nationality Act Section 212 (a) (6) (A) (i)	4
Immigration and Nationality Act Section 240A (b)(1)	4
United States Constitution Fourteenth Amendment	9

STATEMENT OF THE CASE

Petitioner is a twenty-seven year old male, who is a native and citizen of Mexico. He entered the United States at or about El Paso Texas on February 23, 1992 and has remained in the United States ever since that time. Petitioner was subsequently placed in immigration proceedings as an alien present in the United States without admission or parole in violation of Section 212 (a) (6) (A) (i). The Petitioner then filed an application for Political Asylum. At a hearing held on February 15, 2005, the Petitioner withdrew his application for Political Asylum and sought relief by way of Cancellation of Removal based on the hardship to his U.S. citizen wife and children.

The Immigration Judge denied Petitioner's request for Cancellation of Removal under Section 249a (b) of the Immigration and Nationality Act, and granted the Petitioner voluntary departure.

The Petitioner then filed a timely petition with the Board of Immigration Appeals on March 1, 2005. The Board of Immigration Appeals affirmed the decision of the Immigration Judge on March 20, 2006. The Petitioner then filed a Motion in Support of a Stay of Removal and Reconsideration with the Ninth Circuit Court of Appeals which was denied on January 26, 2007.

The Petitioner now files his Petition for a Writ of Certiorari with the Supreme Court of the United States.

THE COURT OF APPEAL ERRED BY FAILING TO GRANT PETITIONER'S MOTION FOR REVIEW AND REHEARING

Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control. The Chinese Exclusion Case, 130 U.S. 581 (1889), Fong Yue Ting v. United States, 149 U.S. 698, (1893), Knauff v. Shaughnessy, 338 U.S. 537 (1950).

However it is also clear that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to the traditional standards of fairness encompassed in due process of law. The Japanese Immigrant Case, 189 U.S. 186 (1903); Woo Yan Sung v. McGrath, 339 U.S. 33, (1950), Kwong Hai Chew v. Colding 344 U.S. 590, 598, (1953),

In Wong Yang Sung v. McGrath, 339 U.S. 33, (1950), it is stated that "Our law may, and does place more restrictions on the alien then the citizen, but basic fairness in hearing procedure does not vary with the status of the accused. If the procedures used to judge the alien are fair and just, no good reason can be given why they should not be extended to simplify the condemnation of the citizens. If they would be unfair to citizens, we cannot defend fairness of them when applied to the more helpless alien. This is at the root of our holdings that the alien must be given a fair hearing to test an official claim that he is one of a deportable class."

The court in Shaughnessy v. Mezei, 345 U.S. 206 (1953) further elaborated, "The most scrupulous observance of due process, including the right to know a charge, to be confronted with the accuser, to cross-

examine witnesses, and to produce evidence in one's own behalf, is especially necessary. The court stated both the old proceedings by which one may be bound to keep the peace, and the newer systems are safeguarded with full rights to judicial hearings for the accused. On the contrary, the Nazi regime in Germany installed a system of "protective custody" by which the arrested could claim no judicial or other hearing process. As a result the country was filled with concentration camps and summary detentions and deportations. Such practices once established with the best of intentions, will drift into the oppression of the disadvantaged in this country as surely as it has elsewhere. Differences in the process of administration make all the difference between a reign of terror and one of law."

It is well-settled that the Fifth Amendment entitles an alien to due process of law in removal proceedings. Reno v. Flores, 507 U.S. 292, 306, 123 L.Ed.2d, 1, 113 S. CT. (1993); also Felzcerek v. INS, 75 F. 3d 112, 115 (2nd Cir. 1996).

Herein the Petitioner seeks due process by asking for a review of his claim for relief from deportation. Denial of review in this instance served no equitable purpose and served to punish the Petitioner for the error of the judge in not giving sufficient weight to the equities of his argument which indicate that he is not being treated equally under the Due Process provisions of the Fourteen Amendment.

The Court of Appeals must review the BIA's denial of a Motion To Reopen or reconsideration for abuse of discretion, regardless of the underlying relief required. INS v. Doherty, 502 U.S. 314, 323 (1992). The Court must reverse the denial of a Motion to Reopen if the

denial is "arbitrary, irrational, or contrary to law." Singh v. INS, 213 F. 3d 1050 (9th Cir. 2000).

REASONS FOR GRANTING THE WRIT

In this instance the Ninth Circuit Court of Appeal failed to consider that the decision of the Immigration Court that was affirmed by the Board of Immigration Appeals, was made without weighing and evaluating any evidence presented by the petitioner. Herein the Immigration Judge determined that the hardship that would be suffered by the American citizen wife and children of the Petitioner, "would be somewhat ameliorated by the fact that the wife can bring the Petitioner back to the United States real quickly by the virtue of her upcoming status as a United States citizen and her willingness to petition for her husband." The Immigration Judge then summarily concluded her reasoning by stating in her decision that; "Based upon that I find that the respondent has failed to sustain his burden of proof." (Appendix C p.4)

Herein the Petitioner sought relief through Cancellation of Removal under Section 240A (b) (1) of the Immigration and Nationality Act. In order to qualify for this relief, in addition to establishing statutory physical presence in the United States, and good moral character, the Petitioner must establish that the removal would result in exceptional and extremely unusual hardship to his qualifying relatives.

The Petitioner in this instance claims hardship to his Lawful Permanent Resident wife, and his two stepchildren, Brian and Christian, 14 and 9 years of age. In 2004, the Petitioner's wife filed on his behalf to

legalize his status. She has also filed for citizenship on her own behalf and her citizenship petition is currently pending.

The Petitioner and his wife and two children all live together and are a very close family. Since the onset of Petitioner's removal proceedings, his wife has suffered from depression and anxiety. It has been determined that should the Petitioner be removed, his wife and his stepchildren would remain in the United States. The Immigration Judge acknowledged that "There will be some pains of separation which are ordinary in light of the relationship that he has with his wife and children." However, the Immigration Judge failed to examine or evaluate any further evidence on behalf of the Petitioner before concluding that the Petitioner's wife could bring the Petitioner back to the United States when she becomes a United States citizen.

The courts have reasoned the "Failure on the part of a reviewing official in considering any of the facts presented constitutes an abuse of discretion." "In making its determination, the Court should look at, "age of the subject, family ties in the U.S. and abroad, length of residency in the U.S., conditions of health, conditions in the country to which the alien is returnable, economic, political and financial status, business and occupation, the possibility of other means of adjustment, whether of special assistance to the United States, or the community, and immigration history. "In making this determination, relevant factors, though not determinative in themselves, must be considered in the aggregate in determining whether cancellation of removal is merited." Salmenda v. INS, 70 F. 3d 447 (7th Cir. 1995)

In this instance the Ninth Circuit Court erred by supporting the Immigration Judge's decision that removal

of the Petitioner was not worthy of consideration on the merits due to the fact that at some point in the future his wife would become a citizen and be able to petition for legal status for her husband.

An abuse of discretion on the part of the reviewing Court must create a situation in which the abuse negatively and distinctly impacts the outcome of the case. Rejection of an alien's argument and evidence, without carefully analyzing all of it terminates an alien's ability to obtain a favorable outcome. If the Court without a thoughtful review of the Board's decision allows the dismissal of all testimony and evidence presented, any alien will fail to meet the requisite standard for qualification. While the Court is vested with authority and discretion, it must be exercised wisely and in a manner that assures that aliens who are before it are able to receive a full and fair review of their case. This is becoming more and more important since fewer and fewer forms of judicial review are available under the present immigration laws.

When, as in this instance, the Petitioner is denied an opportunity to present his argument and his evidence is disregarded, this goes directly to the merits of the case and is clearly an incorrect decision. Failure to consider a Petitioner's testimony and evidence of hardship based on the fact that "sometime in the future he may be able to gain Lawful Permanent Residence through his wife, amounts to a full and fair review of his case in the present. When there is no justification for this type of conduct on the part of the Court, an abuse of discretion is likely present.

Herein the conduct of the reviewing Court denotes the rise of a colorable constitutional claim. The Court found in Chavez-Murillo v. INS, 1999 WL 728521 (9th Cir. 1999), that the Congressional intent to preclude judicial

review of constitutional claims must be clearly evidenced. When the Board of Immigration Appeals made a decision to affirm the holding of the Immigration Judge without opinion, it suggests that the Board failed to consider and evaluate the reasoning of the Immigration Judge, "that the Petitioner would be able to "adjust his status in the future," and further failed to consider and evaluate the evidence in its entirety. This amounts to a failure of due process, raising an issue of a colorable constitutional claim.

CONCLUSION

Petitioner, through his counsel, contends that the Ninth Circuit Court of Appeals erred in denying his Petition for Review and that this denial was manifestly contrary to law. Based upon the aforementioned, Petitioner respectfully requests that this Honorable Court grant the Writ of Certiorari, and permit his case to be remanded for a hearing on the merits.

Dated: March 23, 2007

Respectfully Submitted,

GARY D. OLIVE,
Attorney at Law

JAN 26 2007
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SALVADOR SANCHEZ SALAS, Petitioner, v. ALBERTO R. GONZALEZ, Attorney General, Respondent.	No. 06-73168 INS Nos. A95-451-359 **ORDER**

Before: LEAVY GOULD and CLIFTON, Circuit Judges

Petitioner's "motion in support of a stay of removal" is construed as a motion for panel rehearing. So construed, the motion is denied. To the extent that petitioner requests a further stay of removal, the request is denied. The temporary stay will expire upon issuance of the mandate.

No further filings shall be accepted in this closed docket.

APPENDIX A

U.S. Department of Justice Decision of the Board of Immigration Appeals
Executive Office of Immigration Review

Falls Church, Virginia 22041

Date: JUN 2, 2006

File: A95-451-359 Los Angeles

In re: SANCHEZ SALAS, SALVADOR

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. Section 1003.2 to reconsider our decision dated March 20, 2006. The respondent seeks reconsideration as he avers that the Immigration Judge erroneously found that he did not have a qualifying relative for purpose of cancellation of removal. However, the Immigration Judge made no such finding. Rather the Immigration Judge correctly cited the respondent's then lawful permanent resident wife as a qualifying relative, and found that the respondent had not established that either she or his United States citizen stepchildren would experience exceptional and extremely unusual hardship if he were removed from the United states to his native country of Mexico. (I.J. at 2-4). The respondent offers no arguments with regard to the Immigration Judge's hardship findings, which this Board affirmed. As such, we find that reconsideration is not warranted. 8 C.F.R. Section 1003.2(b). Accordingly, the motion is denied.

"s/_____"

FOR THE BOARD

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES CALIFORNIA

File A 95 451 359 February 14, 2005

In the Matter of

SALVADOR SANCHEZ SALAS) IN REMOVAL
Respondent) PROCEEDINGS
)

CHARGE: Section 212 (a) (6) (A) (i) of the Immigration and Nationality Act- alien present in the United States without permission or parole.

APPLICATIONS: Cancellation of removal under Section 240A (b) (1) of the Immigration and Nationality Act and voluntary departure in the alternative.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Terrance McGuire, Esquire	Alison Healy, Esq. Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 25-year-old native and citizen of Mexico, against whom a Notice to Appear was issued by the Immigration Service on July 22, 2002, charging that the respondent was found to be an alien present in the United States without admission or parole in violation of

Section 212 (1) (6) (A) (i) of the Immigration and Nationality Act. The respondent came before the Court, admitted allegations, conceded he charge of removal, designated Mexico as a country of removal in the event that he was ordered removed, and withdrew his previously filed asylum and withholding applications, requesting relief in the form of cancellation of removal and voluntary departure in the alternative. Based upon respondent's own admissions and exhibits in the record, the Court found clear and convincing evidence that the respondent was subject to removal as charged.

On this date of February 14, 205, the respondent presented his own testimony under oath, together with the application and exhibits in support thereof. The respondent seeks relief of cancellation of removal under Section 240A (b) (1) of the Immigration and Nationality Act. As such, he has the burden of proof in regards to each of the elements of the claim, as well as the issues having to do with discretion.

Amongst other factors, the respondent must establish that the removal would result in the exceptional and extremely unusual hardship to the qualifying relative. In this case, the respondent claims hardship to h is lawful permanent resident spouse, Letitia Salgero, and his two stepchildren, Brian and Christian, 14 and 9 years of age. The Respondent married Letitia Salgero at the end of the year 2002. She, however, being a legal permanent resident, did not petition for the respondent until just lately. Although she had the ability to, she waited until just lately. Although she had the ability to, she waited until last year to file her I-130 for the respondent. Now she has filed for citizenship and her citizenship petition is pending. The respondent has already received notification form the Department of Homeland Security that the I-130 that his wife filed for him has been received.

APPENDIX C

Section 212 (1) (6) (A) (i) of the Immigration and Nationality Act. The respondent came before the Court, admitted allegations, conceded he charge of removal, designated Mexico as a country of removal in the event that he was ordered removed, and withdrew his previously filed asylum and withholding applications, requesting relief in the form of cancellation of removal and voluntary departure in the alternative. Based upon respondent's own admissions and exhibits in the record, the Court found clear and convincing evidence that the respondent was subject to removal as charged.

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APPENDIX C

The two children and the respondent's wife all live together and they are a very close family. The wife is suffering from anxiety and depression, taking medication for it. The cause of the depression and anxiety has to do with the fact that she lost one of the jobs she used to have, and also because of the respondent's immigration problems. When she takes the medication she feels okay. More calmed down, but later on she feels tired and sad. The respondent believes that if he is deported, the wife and the stepchildren will not follow him, but they would be sad. They would suffer some economic hardship because he contributes to some of the expenses of the household and they would miss the respondent. And the depression and anxiety problems of his wife would be exacerbated. The wife did not come to court to testify on his behalf, but has submitted a copy of her legal permanent resident status.

The children are in good health. They do well in school. The have some minor health problems having to do with colds and vomiting and it has been taken care of by the doctors on occasion when they get ill. Their primary language is English, but they also speak Spanish.

The Board of Immigration Appeals Matter of Monreal, 23 I&N Dec. 56, 63 (BIA 2001) held that the alien must demonstrate that the hardship to his qualifying relative, that they would suffer, would be substantially beyond that which would ordinarily be expected to result from the alien's deportation. In this case, I do not find that the respondent has established that degree of hardship. There would be some pains of separation which are ordinary in light of the relationship that he has with his wife and children. This hardship would be somewhat ameliorated by the fact that the wife can bring the respondent back into the United States real quickly by virtue of her upcoming status as a United States citizen and her willingness to petition for her husband. Based

upon that, I find that the respondent has failed to sustain his burden of proof.

ORDER

IT IS THEREFORE THE DECISION OF THE COURT that the respondent's application for cancellation of removal under Section 240A(b) (1) of the Immigration and Nationality Act be and is hereby denied.

IT IS FURTHERMORE THE ORDER OF THE COURT that the respondent be and is hereby granted voluntary departure, provided that he leaves the United States on or before April 15, 2005, or he will be deported to Mexico.

IT IS FURTHERMORE THE ORDER OF THE COURT that the respondent post a bond of $500 within five business days of this order or he will be ordered deported to Mexico.

" "

Isabel Bronzina
Immigration Judge

APPENDIX C

§ 212(a)(6)(b)

INA

(6) Illegal Entrants and Immigration Violators

(A) Aliens Present Without Permission or Parole

(i) In General

An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

INA Section 240A (B)(1)

(A) The Attorney General may, in his or her discretion, cancel removal and adjust the status from such cancellation in the case of an alien who is removeable from the United States if the alien demonstrates that

(i) the alien has not been convicted of an aggravated felony and

(ii) the alien is not described in paragraph (4) of section 237(a) or paragraph (3) of section 212(a) of the Act; and

(iii) has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character, and is a person whose removal would, in the opinion of the Attorney general, result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States, or an alien lawfully admitted for permanent residence.

APPENDIX E

U.S. Constitution: Fourteenth Amendment

Amendment Text
Annotations

Section. 1. all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens in the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F